Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-332

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

MAS FUJIMOTO, DELMER EISERT,
ROBERT GUY and AGNES GUY, Petitioners,

v.

CITY OF HAPPY VALLEY, et al, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

TERRY D. MORGAN
MORGAN & SHONKWILER, P. C.
205 Metro Housing Center Bldg.
15555 S. W. Bangy Road
Lake Oswego, Oregon 97034
Telephone: (503) 684-0946

Counsel for Petitioners

FRANK JOSSELSON
(Counsel of Record)
STEPHEN F. ENGLISH
WOLF, GRIFFITH, BITTNER,
ABBOTT & ROBERTS
Suite 800, One SW Columbia
Portland, Oregon 97258
Telephone: (503) 222-4422

Counsel for Respondents

TABLE OF CONTENTS

		Page
1.	Cause is Not Moot	1
2.	Oregon's Statewide Land Use Planning Process Not Affected by Temporary Taking Remedy	7
3.	City's Liability is Apparent on Face of Complaint	13
4.	Abstention Issues as Independent Ground for Issuance of Writ	18
CONCLUSION		20

TABLE OF AUTHORITIES

	Page
CASES	
Baker v. City of Milwaukie, 271 Or 500, 553 P2d 772 (1975)	15
Penn Central Transportation Co. v. City of New York, 438 US 104 (1978)	16
San Diego Gas & Electric Co. v. City of San Diego, 450 US 621 (1981)	2
Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N. J. 151, 336 A2d 713 (1975)	11
STATUTES	
Or. Rev. Stat. 197.251	5
Or. Rev. Stat. 197.275(1) (1977 Rep. Pt.)	10
CONSTITUTIONAL PROVISION	
United States Constitution, Fifth Amendment, Just Compensation Clause	2-3, 18

TABLE OF AUTHORITIES

Page

ADMINISTRATIVE DECISION

Seaman v. City of Durham, 1 LCDC 283 (1978) 10-11

ADMINISTRATIVE RULES

Statewide Goal 6 (water resources), Or. Admin. Rules, ch. 660 (Appendix) 6

Statewide Goal 10 (housing), Or. Admin. Rules, ch. 660 (Appendix) 6

Statewide Goal 11 (public facilities and services) Or. Admin. Rules, ch. 660 (Appendix) 6

PERIODICALS

Morgan & Shonkwiler, Statewide Land Use Planning in Oregon with Special Emphasis on Housing Issues, in Stuhler & Freilich, The Land Use Awakening (1981) at 247 11

Page

APPENDIX A

Land Conservation and Development Commission Order of Denial, April 16, 1982 A-1

APPENDIX B

Findings supporting LCDC Order of Denial (Excerpts) B-1

APPENDIX C

Plaintiffs' Complaint (Excerpts) C-1

REPLY BRIEF

1. Cause is Not Moot

Respondents' assertions that this controversy has become moot contain two very different premises. The first rests upon the erroneous factual statement that Petitioners are now free to develop their property for some reasonably beneficial use under the City's 1980 comprehensive plan and zoning ordinance. This statement is irrelevant to this proceeding unless the Court is also willing to assume the second premise of Respondents' mootness argument: there is no compensation remedy for a temporary taking where the City adopts a plan and implementing ordinances which arguably confer development rights on previously restricted lands.

Respondents' mootness argument underscores the necessity for this Court to resolve the temporary taking question.

The landowners filed their complaint based upon the City's course of conduct dating from its 1973 comprehensive plan. The City ultimately rejected subdivision applications submitted under that plan. The City now contends that "the comprehensive plan now in effect changed all relevant city policies and established new, more valuable uses for Petitioners' lands." Respondents' Brief, p. 5.

This is precisely the reasoning that led Justice Brennan in his dissenting opinion in San Diego Gas & Electric Co. v. City of San Diego, 450 US 621, 101 S. Ct. 1287 (1981), to conclude that mere invalidation of otherwise confiscatory land use regulations were not a sufficient remedy under the Just Compensation Clause of the Fifth Amendment. Justice Brennan was particularly concerned with the ability of municipalities to transmute offensive

regulations into slightly different ones which may not put the property owner in any better position economically than he was before the enactment of the amendatory regulations. 101 S. Ct., supra at 1305, n. 22. Under Justice Brennan's formulation, the Just Compensation requirement of the Fifth Amendment is self-executing: "Once there is a 'taking,' compensation must be awarded." The enactment of new policies - if such policies truly terminate previously confiscatory regulations - will serve only to limit the period of liability for which the City was obligated to compensate the landowners.

In the instant case, the City has amended its regulations only after having deprived the landowners of all economically viable uses of their land for a period of at least seven years. In order to reach Respondents' arguments on mootness, this

Court would first have to determine the temporary taking question. Hence, the case is in a proper posture to resolve that substantial federal question.

Even if the Court were to find that a City could moot out an inverse condemnation claim by adopting amendatory regulations during the pendency of litigation, this effect would only result if the regulations provided the landowners with a real opportunity to realize a return on their investment. Respondents boldly assert that Petitioners now have such an opportunity to developer their property under the 1980 comprehensive plan. That statement ignores the State proceedings which have concluded since the enactment of the 1980 comprehensive plan. As of April, 1982, the City has no valid comprehensive plan under state law. Rather, LCDC has determined that the

City's plan is in violation of nine of fourteen applicable statewide planning goals. A-2.

Pursuant to Or. Rev. Stat. 197.251, LCDC has issued an order denying the City's request for an "acknowledgment of compliance" that its plan and ordinances are consistent with the statewide planning goals. A denial of acknowledgment contrasts with an order of continuance and is used only where required changes in the plan or regulations "affect many goals and are likely to take a substantial period of time to complete." Id. at Section (8).

The nature of the goal violations directly pertains to Respondents' assertions that the 1980 comprehensive plan affords landowners reasonable development rights. For example, the findings accompanying the order of denial

identify the following deficiencies in the City's plan and ordinances. With respect to Goal 6 (water resources), the City "has not adopted a time-specific facility plan for the provision of sewer to areas with failing septic tanks." B-9, 10. With respect to Goal 10 (housing), the City "has failed to recognize its regional housing density and mix obligations" and "there is inadequate commitment in the plan to provide urban-level services to otherwise buildable land." B-10. With respect to Goal 11 (public facilities and services), it is stated that "sewer and water facilities plans have not been prepared and adopted." B-11.

These deficiencies demonstrate that the City's plan was a sham, since Petitioners could not obtain public facilities and services necessary to develop their property. Following issuance

of LCDC's acknowledgment order, Petitioners could not have obtained development approvals at the densities designated in the City's plan without violating state law. This case is not moot, because the City continues to restrict the development of Petitioners' lands.

2. Oregon's Statewide Land Use Planning Process Not Affected by Temporary Taking Remedy

In the third section of their brief, Respondents assert that any interferences with Petitioners' property rights during statewide land use proceedings relating to Happy Valley are noncompensable. Respondents' position is simply another facet of their argument in Section 4 that the federal court should abstain from airing constitutional claims in order to avoid a chilling effect on Oregon's statewide planning system. In effect, Respondents urge the adoption of a doctrine of

exhaustion of state judicial remedies prior to a federal ruling on inverse condemnation. These arguments are advanced without any demonstration whatsoever of how a ruling on Petitioners' federal constitutional claims affects the statewide planning program.

Respondents' argument misses the point. Plaintiffs' Complaint is directed at the conduct of the City and its officials from the enactment of the 1973 comprehensive plan to the date of the filing of the complaint. The City admits that it engaged in activities to resist inclusion within the regional urban growth boundary and prevented the annexation of City lands to a county service district. The Complaint details a number of other ongoing efforts, including manipulation of the statewide planning process, which were allegedly designed to keep development out of Happy Valley. Petitioners have alleged that the

cumulative effect of the regulations and the City's course of dealings was to deprive them of all economically viable uses of the property during this period.

State proceedings regarding the City's planning process are totally irrelevant to the claims asserted in the Complaint. Petitioners do not complain merely that the City's planning process leading up to the adoption of a new plan consumed time (7 years). Rather, the gravamen of the Complaint is that the City knowingly and actively restricted Petitioners' use of the land during that process, thereby confiscating it.

The City's argument might have some merit if the restrictions on Plaintiffs' lands were somehow mandated by the state-wide planning process. If, for example, LCDC had required the City to impose a moratorium on residential development or

to reduce its densities or prevent the installation of sanitary sewers until it had adopted a plan which complied with the statewide goals, compensatory relief for the landowners might have an effect on the statewide program. The City cannot hide behind the statewide program to escape liability in this instance, however. In the first place, Oregon law provided that comprehensive plans were to remain in effect until revised under the statewide planning scheme. Or. Rev. Stat. 197.275(1) (1977 Rep. Pt.), repealed 1981 Or. Laws, c. 748, Sec. 56. Secondly, LCDC has interpreted the statewide goals to mandate urban responsibilities for the City of Happy Valley.

As Respondents admit in their Brief, the State of Oregon has adopted a "regional fair share program" under the statewide planning legislation. In Seaman v. City

of Durham, 1 LCDC 283 (1978), the Commission adopted a policy requiring each constituent government of the Portland metropolitan area to provide for its regional fair share of housing opportunities by planning for sufficient numbers of least and moderate cost housing units. Thus the State of Oregon has accomplished through administrative fiat what the State of New Jersey initially accomplished through judicial interpretation of the state's constitution in the landmark decision of Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N. J. 151, 336 A2d 713 (1975). See generally, Morgan & Shonkwiler, Statewide Land Use Planning in Oregon with Special Emphasis on Housing Issues, in Stuhler & Freilich, The Land Use Awakening (1981) at 247.

It is the direction of the state's program rather than its existence that is

material to this proceeding. The adoption by LCDC of a regional fair share housing program has resulted in the denial of the City's acknowledgment request and a decree directing the City to provide for fair share opportunities and to prepare the necessary facilities plan for making development possible. Given these events, it is ironic that the City characterizes its planning efforts as pursuing "legitimate state interests."

This is not to say that the State's program is designed to benefit individual landowners subject to confiscatory land use regulations. Rather, the State's actions against the City are designed to promote the welfare of the Oregon households who cannot afford to live in the City because of its restrictive housing policies. If landowners acquire development rights in the process, it is only because private

housing production is the means toward the accomplishment of the State's fair housing policy. And even if some of Petitioners in this case obtain relief through the state administrative process (which will be determined in part through the appeals now pending in State court), they still must bear the cost of some ten years delay individually. It is these losses which is the subject of Petitioners' Complaint.

3. City's Liability is Apparent on Face of Complaint

Respondents suggest that no taking claim, either permanent or temporary, is stated on the face of the Complaint. It is not Petitioners' place at this point in the proceedings to argue the merits of the case. Nevertheless, Petitioners must demonstrate that the case is an appropriate vehicle for the resolution of substantial federal questions. The issue of remedy

cannot be reached unless the City's liability is ascertained from the face of the Complaint.

Respondents advance two grounds: (1) the Complaint does not establish that the Petitioners' lands were initially valuable and hence that a "down zoning" has been effected; and (2) the City is not constitutionally required to provide Petitioners with sewer services in order to make their lands valuable for development. (It should be noted that neither of these grounds were the basis for the Ninth Circuit's holdings). Petitioners are entitled to all reasonable inferences which can be made from the allegations in the Complaint.

Petitioners' lands have been "down zoned" by the City on at least two occasions prior to the filing of the Complaint in 1978. All of Petitioners'

lands were acquired during or prior to 1970. C-1, 2. Prior to inclusion in the City, the property was zoned for 15,000 square foot lots. The City's first zoning ordinance, which allowed for 20,000 square foot residential lots, was adopted in 1970. C-3. In 1973, the City adopted a comprehensive plan declaring portions of the Petitioners' property as open space. The remainder was subject to development guidelines which specified minimum lot sizes based on soil suitability for septic tanks. According to the landowners' consultant, who applied development standards under the plan to Petitioners' property, no economically viable use remained for the property. Petition, p. E-9.

As Respondents acknowledge, the plan is the controlling land use document in the State of Oregon. Baker v. City of Milwaukie, 271 Or 500, 514, 533 P2d 772

(1975). The adoption of the 1973 plan effectively superseded the R-20 zoning with respect to Petitioners' property. In 1977, the City established a minimum lot size of 1.5 acres throughout the City, constituting the second "down zoning" of Petitioners' property. Petition, p. D-23. From these allegations, the Court can determine that the City devalued the Petitioners' property through its enactment of regulatory measures.

Even if the sole acts complained of were the City's refusal to permit sewers inside its boundaries, a substantial federal question would be stated under the facts alleged in the Complaint. In Penn Central Transportation Co. v. City of New York, 438 US 104, 125 (1978), this Court instructed that regulations would be evaluated with respect to whether they had interfered with the landowners' "investment-

backed expectations." The allegations of the Complaint demonstrate that the Plaintiffs purchased their lands with the reasonable expectation that they could be developed for residential purposes. In addition to the residential zoning classification for the subject property, the lands were initially included in a sanitary sewer district in 1967. C-3 The City subsequently voted to withdraw from the service district. C-5.

Thereafter, state health officials directed the City to prepare a facilities plan for the installation of sanitary sewers. Petition, p. D-3, 4. The City was well aware of the fact that Petitioners needed sewers to develop their property. Indeed, the Petitioners on more than one occasion sought to obtain sewer service through annexation to the county service district. Petition, p. D-14, 23-26.

Nevertheless, the City actively attempted to keep sewers out of the City by procuring a "rural" classification from the regional planning agency, id. at D-7, and delayed the preparation of the facilities plan. Id. at D-5, 6. These allegations established that the landowners had reasonable investment-backed expectations that their property could be used for residential purposes with sanitary sewers and the City actively rather than passively opposed their attempts to procure sewer service. This is sufficient to state a cause of action under the Just Compensation Clause of the Fifth Amendment.

4. Abstention Issues as Independent Ground for Issuance of Writ.

Respondents would apparently revive the District Court's holding that abstention was appropriate in this case. Under Respondents' view, the mere fact that Oregon

has a statewide planning program should dissuade federal courts from exercising jurisdiction over federal constitutional claims. Respondents never explained how a claim for damages is disruptive to the State's land use planning process in general, much less how a damages award against the City of Happy Valley disrupts such efforts.

The issue deserves to be resolved. Must Petitioners wait an indefinite period of time for the conclusion of a state planning process which is not intended to benefit them in the first instance in order to vindicate federal constitutional rights? If, at the conclusion of that process, Petitioners do not have development rights, will the statute of limitations have run to preclude an award of damages for a temporary taking?

Petitioners stand on the statement that there is variance among the circuits

as to how the abstention doctrine should be applied to inverse condemnation challenges involving land use matters. The District Court's holding exemplifies the blanket abstention doctrine which was hitherto the rule in the Ninth Circuit and stands in contrast with the decisions cited in the Petition.

CONCLUSION

For these reasons, Petitioners' claim is not moot and the writ should issue.

Respectfully submitted,

MORGAN & SHONKWILER, P. C.

Terry D. Morgan, OSB #76259
Of Attorneys for Petitioners

205 Metro Housing Center Building
15555 S. W. Bangy Road
Lake Oswego, Oregon 97034
Telephone: (503) 684-0946

BEFORE THE
LAND CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF OREGON

IN THE MATTER OF	)	DENIAL
THE CITY OF HAPPY VALLEY	)	ORDER
COMPREHENSIVE PLAN AND	)	
IMPLEMENTING MEASURES	)	ORS 197.251

This matter came before the Commission as a request from the City of Happy Valley on September 2, 1980, for Acknowledgment of Compliance pursuant to ORS 197.251 and the Commission Acknowledgment Rule, OAR 660-03-000 to 660-03-035. The Commission, having fully considered the City's comprehensive plan and implementing measures, comments and objections of interested parties, and the report of the Department of Land Conservation and Development, now enters its:

Findings of Fact

1. The City of Happy Valley comprehensive plan and implementing measures comply with Statewide Planning Goal(s) 3, 4, 7, 8 and 13 for the reasons set forth

in Section IV of the Department's report, dated January 28, 1981 as revised on December 21, 1981 which is by reference incorporated herein.

2. The City of Happy Valley's comprehensive plan and implementing measures do not yet comply with Statewide Planning Goal(s) 1, 2, 5, 6, 9, 10, 11, 12 and 14 for the reasons set forth in Section IV of the Department's report dated January 28, 1981 as revised on December 21, 1981 which is by reference incorporated herein.

Conclusions

1. The comprehensive plan and implementing measures of the City of Happy Valley require additional planning work for many Goals in order to be considered by the Commission to be in compliance with Statewide Goals.
2. A substantial amount of additional

time is necessary for the City to complete additional planning work necessary to bring its comprehensive plan and implementing measures in compliance with all Statewide Goals.

THEREFORE, IT IS HEREBY ORDERED THAT:

In accordance with ORS 197.251 and the Commission's Acknowledgment Procedure Rule, OAR 660, Division 3, the acknowledgment request for the City of Happy Valley is Denied and the City is required to submit a work program for Commission review and approval. This work program must show how the city will complete the compliance requirements outlined in the staff report which is referenced above. The work program must be submitted to the Department of Land Conservation and Development at its Salem, Oregon office by May 6, 1982. The Commission approval or approval as modified of the city's work program shall

be incorporated within and is enforceable through this order.

DATED THIS 16TH DAY OF APRIL, 1982.

FOR THE COMMISSION

/s/D. Lorin Jacobs
D. Lorin Jacobs,
Chairman
Land Conservation and
Development Commission

NOTICE: You are entitled to judicial review of this Order. Judicial Review may be obtained by filing a petition for review within 60 days from the service of this final Order. Judicial review is pursuant to the provisions of ORS Ch. 183.482 (ORS 197.650).

APPENDIX B

B-1

EXCERPTS FROM FINDINGS ON DENIAL ORDER

LAND CONSERVATION AND
DEVELOPMENT COMMISSION

ACKNOWLEDGMENT OF COMPLIANCE

City of Happy Valley

DATE RECEIVED:
September 2, 1980

DATE OF COMMISSION ACTION:
February 12-13, 1981
Revised November 19, 1981
Revised December 21, 1981

(Page 2)

IV. FINDINGS

Compliance Status

Happy Valley received $12,000 in Fiscal Year 1976-77, and used this money to hire a consultant to prepare a draft plan. The City rejected this plan. In 1977 Happy Valley was designated "Rural" by the Columbia Regional Association of Governments (CRAG). In the fall of 1978,

following LCDC's determination that there was insufficient justification for this "Rural" designation (LCDC 77-016), CRAG redesignated the City "Urban".

Happy Valley received an additional $5,490 in Fiscal year 1977-78. The City proceeded to work towards the adoption of a new plan based on a "volunteer" effort. Metro evaluated Happy Valley's second draft plan in July of 1979, and concluded that the City's justification for its low planned densities was inadequate. In October of 1979, the Department of Land Conservation and Development approved a finding of satisfactory progress, with the understanding that higher residential densities would be considered by the City in its planning process.

In the meantime, a consultant was hired by the City to develop a plan consistent with the Happy Valley "Urban" designation.

In November of 1979, Happy Valley requested a planning extension to July 1, 1980. The Department deferred final action on this request until Metro and the Department had an opportunity to fully review Happy Valley's draft plan. In March of 1980, Metro reviewed the City's third draft plan and recommended that a planning extension be approved with conditions. However, both the Happy Valley Landowners Committee and the Metropolitan Home Builders Association objected to Metro's review as being inconsistent with Commission policy established through the Metro UGB acknowledgment proceedings. On June 27, 1980 the Director approved the City's planning extension request to July 1, 1980. The Director's approval letter outlined Goal 10 housing expectations in

the Metropolitan region and buildable lands inventory requirements (see Appendix B). Happy Valley submitted its plan for acknowledgment review on September 2, 1980.

General Overview:

Happy Valley was incorporated in 1965 in order to control development and to preserve a rural way of living. Happy Valley's plan generally protects Goals 5 and 7 resources, but unduly restricts development on buildable land. The City's comprehensive plan is designed to maintain a low density semi-rural enclave in the growing Metropolitan region. Metro summarizes the regional implications of the City's urbanization policy and explains why such an approach violates several Statewide Planning Goals:

> "The key issue underlying the staff's recommendation for a continuance of Happy Valley's plan is the City's failure to

plan for an urban future. The City plans to develop a residential density of 2-2 1/2 units per acre. Metro staff finds that Goal 10 and Goal 14 requires at least six units per acre. The difference is between an urban and a rural future. Staff considers this to be a crucial shortcoming for both policy and practical reasons.

Policies adopted by Metro and the LCDC have clearly designated Happy Valley as part of the urban area. LCDC, under the UGB, and its review of Metro area jurisdictions, has established the principle - with which Metro has concurred - that cities within the Boundary must assume responsibility for meeting the region's housing needs. To acknowledge Happy Valley's plan which contemplates an essentially rural future, undermines the adopted UGB and treats unfairly other cities and counties who have worked in good faith to meet their responsibilities.

As a practical matter, Happy Valley should develop at urban densities. The City's location and accessibility and the future economic trends of the area make Happy Valley uniquely suited to accommodate an important share of regional growth.

Already, regional investments have improved transportation in and to the Happy Valley area. The I-205 freeway is and will continue to be the only major uncongested freeway in

(Page 4)

the Portland area. Other investments planned in Regional Transportation Plan (RTP) - improving McLoughlin Blvd. and widening Sunnyside Road to four lanes - will further improve Happy Valley, will have access to the only major radial corridor - Clackamas Expressway/ McLoughlin Blvd. - not operating at or above capacity. In addition, I-205 will be below capacity from Orchards, Washington, to Wilsonville. Tri-Met's Transit Improvement Program calls for bus service to Happy Valley by 1985. A north/south busline will connect Happy Valley with Light Rail Transit (LRT) at 122nd and Burnside and to Clackamas Town Center. Clackamas Town Center itself will be a major transit center with direct service downtown and along I-205.

Happy Valley will also have access to nearly 100,000 new jobs in the next two decades. Metro's Transportation Department has prepared detailed estimates of new employment by traffic zone.

These estimates project that nearly 15,000 new jobs will become available in the Happy Valley and Town Center traffic zones by year 2000, and that nearly 100,000 total new jobs will open in the I-205 Corridor between Orchards and Tualatin. This excludes new downtown jobs which will be easily accessible to Happy Valley residents.

The Clackamas Town Center area is destined to be a major growth center. A super regional shopping center, the nearby industrial areas in Clackamas County and better than average transportation access give this area a large comparative advantage in accommodating growth over other areas in the region.

The region has made a substantial investment in urban level service in this part of Clackamas County. Developing Happy Valley at low densities will undercut these investments and put more development pressure on jurisdictions whose resources are already hard pressed and who are relatively less capable of handling more growth.

Each of the major issues identified by staff in reviewing the Happy Valley comprehensive plan relate to the City's role in providing urban land for future growth. Housing density,

housing types, septic tanks, sewers, street and road standards and commercial land are controversial because, in each case, the City is attempting to retain a fundamentally rural character. Metro staff points out that it is necessary - because of Happy Valley's inclusion in the UGB - and appropriate - because of Happy Valley's advantageous location - for the City to develop at minimally urban levels."

(Page 5)

The following compliance deficiencies have been identified:

GOAL 1: Happy Valley does not have a plan policy for continuing citizen involvement consistent with its adopted CIP.

GOAL 2: Plan elements related to economic growth, housing, public facilities and services and transportation were not developed consistent with the City's urban role.

The City's "composite development

suitability" analysis has not been consistently applied in determining residential densities or in protecting resources.

The plan lacks a policy to coordinate with affected agencies in review and update.

Underlying residential densities in areas designated for public use are not clearly indicated in the plan.

GOAL 5: Wooded habitat areas on slopes of greater than 25 percent are not adequately protected.

Wetlands and historic resources are not consistently inventoried or appropriately considered in the development process.

GOAL 6: Happy Valley has not adopted a time-specific facility plan for

the provision of sewer to areas with failing septic tanks.

GOAL 9: Happy Valley has not considered the needs for commercial and employment opportunities consistent with its urban role in the region.

GOAL 10: Happy Valley has failed to recognize its regional housing density and mix obligations under Goal 10.

Residential plan designations are not consistent with the City's suitability analysis.

There is inadequate commitment in the plan to provide urban-level services to otherwise buildable land.

The Land Development Ordinance contains vague and discretionary approval standards for needed

housing at planned densities. Open space dedication and fee requirements have not been assessed for their impacts on housing costs.

GOAL 11: Sewer and water facilities plans have not been prepared and adopted.

GOAL 12: Happy Valley has not planned its transportation system to meet future urban development needs.

(Page 6)

GOAL 14: Happy Valley has not reviewed the impacts of allowing septic tank development.

APPENDIX C

C-1

EXCERPTS FROM PLAINTIFFS' COMPLAINT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MAS FUJIMOTO, DELMER EISERT, ROBERT and AGNES GUY,	Civil No. 78-476
Plaintiffs,	COMPLAINT FOR INVERSE CONDEMNATION AND CIVIL RIGHTS DAMAGES
vs.	
CITY OF HAPPY VALLEY, et al	DEMAND FOR JURY TRIAL
Defendants.	

4

Plaintiff Mas Fujimoto is the owner of approximately 90 acres of land within the incorporated limits of the City of Happy Valley. Approximately 50 acres of land, located in Section 35, T1S, R2E, W.M., form the subject of this appeal and hereinafter will be referred to as "the property." Mr. Fujimoto acquired the property in 1970.

5

Delmer Eisert is the owner of approximately 40 acres of land within the incorporated limits of the City of Happy Valley, located in Section 35, T1S, R2E, W.M. Mr. Eisert resided in the City of Happy Valley for approximately 20 years and acquired the property during the years 1963 and 1968.

6

Robert and Agnes Guy, husband and wife, are the owners of approximately 30 acres of land within the incorporated limits of the City of Happy Valley, located in Section 27, T1S, R2E, W.M. Mr. and Mrs. Guy acquired the property in 1965 and resided on contiguous land in the city for approximately six years.

25

The first council meeting for the city was held on November 17, 1965, at which Defendant Robnett was elected mayor of the city. The council adopted a building code and subdivision regulations on that date. The planning and zonning commission was created on January 20, 1966. Clackamas County rezoned land inside the city from

R-15 (single-family residential, 15,000 square foot lots) to R-20 (single-family residential, 20,000 square foot lots) on February 24, 1967. The city adopted a zoning ordinance establishing the R-20 district in 1970.

26

The voters of Clackamas County formed Clackamas County Service District No. 1 on March 24, 1967. The purpose of the Service District was to provide treatment facilities for sanitary sewers for the included territory. The City of Happy Valley was included within the original boundaries of the District. The city conducted an election on November 30, 1967, for the purpose of annexing to the Service District. By a vote of 112 to 99, voters approved annexation to the Service District. The city approved the annexation by Ordinance 21 on December 4, 1967.

27

Clackamas County subsequently determined that the City of Happy Valley residents could not be levied for the payment of the bonds which had been authorized for sale by the district without a further election by the district. Construction of the treatment facilities for sewage disposal proceeded on the assumption that Happy Valley would be serviced by the district. Representatives of the Service District made presentations to the city concerning the proportionate costs of interceptor sewer and treatment plant to city residents and methods of financing these obligations. Interceptors for transmission of sewage wastes have been constructed to the southern and western borders of the city.

28

The City of Happy Valley held public

hearings on annexation to the Service District in May of 1972. On October 10, 1972, the USDA Soil Conservation Service reported to the city council that the entire area of the city was unsuitable for subsurface waste disposal. The city conducted an election for annexation to the Service District on October 17, 1972. Happy Valley voters rejected annexation to the district by a margin of 7 to 1.

29

Defendants were aware of multiple septic tank failures within the city limits prior to the second annexation election.

30

Defendants, acting individually and in concert, under color of state law, failed to properly inform Happy Valley residents prior to the second annexation election of serious health hazards facing the city without the installation of sani-

tary sewers to correct existing sewage disposal problems. Individual Defendants used their offices to manipulate public sentiment against annexation to the district for the purpose of preventing increased development within the city boundaries.

CERTIFICATE OF SERVICE

I hereby certify that on this_____ day of December, 1982, three copies of the Reply Brief were mailed, postage prepaid, to Frank Josselson and Stephen F. English, of Wolf, Griffith, Bittner, Abbott & Roberts, Suite 800, One Southwest Columbia, Portland, Oregon 97258, counsel for Respondents. I further certify that all parties required to be served have been served.

MORGAN & SHONKWILER, P. C.

Terry D. Morgan
Counsel for Petitioners

205 Metro Housing Center Building
15555 S. W. Bangy Road
Lake Oswego, Oregon 97034
Telephone: (503) 684-0946